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90-1346

No.

Supreme Court, U.S.
FILED
JAN 4 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

GENNIE DARYL KING,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Erskine R. Mathis
Attorney for the Petitioner
1117 22nd Street South
Birmingham, Alabama 35203
(205)933-1300

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Petitioner's Motion to Suppress the results of his illegal search and seizure was properly denied.

2. Whether the Court of Appeals erred in affirming the trial courts increasing of the defendant's sentence by refusing to grant credit for acceptance of responsibility and adding points for obstruction, when no evidence of obstruction was educed.

CERTIFICATE OF INERESTED PERSONS

The undersigned counsel of record for the appellant certifies that the following persons are interested in the outcome of this case:

United States Attorney's Office
AUSA John C. Earnest, Jr.
1800 North 5th Avenue
Birmingham, Alabama 35203

The Honorable U.W. Clemon
United States District Judge
Northern District of Alabama
Federal Courthouse
1729 North Fifth Avenue
Birmingham, Alabama 35203

Mr. Gennie Daryl King
No. 17149-001
FCI Talladega
Renfroe Road
Talladega, Alabama 35160

Mr. Erskine R. Mathis
Attorney for Appellant
1117 22nd Street South
Birmingham, Alabama 35205

By: _____
Erskine R. Mathis
Attorney for Appellant

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be siezed.

2. The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property without due process of law . . .".

3. Title 21 U.S.C. Section 841 is too voluminous to be presented herein. Therefore it is contained in its entirety, in the appendix. (infra p. 13).

4. United States Sentencing Commission, Guidelines Manual, Section 3C1.1 and commentary is to voluminous to be presented herein. Therefore, it is contained in its entirety, in the appendix. (infra p.20).

5. United States Sentencing Commission, Guidelines Manual, Section 3E1.1 and commentary is to voluminous to be presented herein. Therefore, it is contained in its entirety, in the appendix. (infra p.22).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO.

GENNIE DARYL KING, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Erskine R. Mathis, Attorney for the Petitioner, Gennie Daryl King, respectfully petitions this Honorable Court on behalf of the Petitioner, for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

There were no opinions filed in this case by the Court of Appeals or the District Court, however, there are two opinions by the United States Magistrate; one entitled Magistrate's Report and Recommendation, which is set out infra, p. , and the other Magistrate's Supplemental Report and Recommendation, which is set out infra, p. Defense Objections To Magistrates Report and Recommendations, is set out infra, p. . The judgment of the Eleventh Circuit Court of Appeals is set out infra, p. . The judgment of the District Court is set out in the appendix, infra, p. .

JURISDICTION

Defendant was indicted on June 30, 1989, on one count of violation of Title 21 U.S.C. 841 (a)(1), possession with intent to distribute a controlled substance (cocaine). Three separate suppression hearings were held regarding the traffic stop and the illegal

search. Each time, the court denied the Motion to Suppress. The last suppression motion was held immediately prior to trial. On the trial court's adverse ruling the defendant entered a plea of guilty, on September 9, 1989. Defendant was sentenced on December 15, 1989, to the custody of the Bureau of Prisons for one-hundred twenty (120) months, five years (5) on supervised release, assessed a $50.00 fee, but no fine and costs, noting the defendant was indigent.

Defendant filed notice of appeal on December 20, 1989, and the conviction was affirmed without written opinion on August 14, 1990. Defendant then filed a Petition For Rehearing which was denied without opinion on October 31, 1990.

This Petition for a writ of certiorari is brought pursuant to T.28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On June 10, 1989, at about 2:00 p.m., Birmingham Police Officers E.W. Clements and Carlos Owen were on partol in the Ensley area of Birmingham, on 14th Street and Avenue F. They observed a maroon and black Samurai Suzuki being driven by the defendant but owned by another man named Broderick Thomas (R3-40). Officer Owen had previously stopped the Suzuki and issued Thomas warnings for no valid drivers license. (R3-39 & 40). The front of the Suzuki bore a license plate with the words "Brods Samurai". (R4-46). The officers testified the Suzuki was stopped because the driver failed to give a right hand signal as provided for in the Code of the City of Birmingham 10-8-35. (R8-8). Officers turned on the blue lights on their vehicle and stopped the Suzuki at approximately 14th Stree and Avenue I. Officer Clements, sitting on the driver's side of the patrol car, radioed in theri position and requested a check of the license tag. Clements observed the defendant

looking at him in the rear view side mirror of the Suzuki. As Clements radioed for information, his partner, Officer Owen approached the passanger side of the Suzuki and took up a protective surveillance point, behind and to the side of the passanger window. Officer Clements finished his radio call and exited the patrol car and defendant exited the Suzuki. As the defendant exited, officer Owen said he observed the defendant either knock or dislodge a small shoe box which fell from the console onto the passanger side floor board of the Suzuki. Owen said the lit of the box fell off and Owen said he observed a clear plastic bag containing what he said appeared to be cocaine. The passanger in the Suzuki, a Ms. Marvalyn Whatley jumped out of the vehicle hollering "I don't know what it is. It's not mine." At that time, Officer Owen reached into the vehicle and seized the white powder. Later tests showed it was cocaine hydrochloride. Owen informed his partner Clements what he found and

arrested the defendant and Ms. Whatley, placing them both in the patrol car. The Suzuki was searched and $5,950.00 was found in the console. Ms. Whatley was subsequently released after being charged with no valid state drivers license.

ARGUMENT

This appeal involves one or more questions of exceptional importance:

THE SHAM TRAFFIC STOP AND ILLEGAL SEARCH

Whether we, as a nation, should be forced to undergo random traffic stops and searches of our automobiles at the whim of individual police officers for no reason, other than the officers desire to see what he may find in the automobile. This problem pervades certain low income areas of Birmingham, and probably most major cities in the country.

Why should I call it a problem? It is certainly not a thing I have to deal with in my own day to day experience. I would submit it is not something that any member of the bar

or other professional group has to deal with other than in extreme instances.

If it does not happen to us then why should it and how could it be happening to poor people, especially poor black people in the inner cities? Because we look the other way. Judges habitually look the other way and bend over backward to accept what the police say as true, and what the defendant's say as lies.

That is exactly what occured here. The police stopped appellant's automobile for the sole purpose of searching it. The plan was simple and one followed by most police forces in the country. If you do not find anything, no one is hurt and the people stopped will be so glad they did not get arrested or receive a ticket that they will not say anything. If they do say anything it will be all right because they will not be believed. The officers have confined their stop to poor, undereducated, politically bankrupt sections of the community where the rich and the

powerful do not go.

If the officer does find anything, he justifies the search by saying he stopped the individual because of some traffic infraction, then, in the course of writing the ticket saw contraband in plain view. Officers never find contraband without a warrant if it is not in plain view. The plain view doctrine, Coolidge v. New Hampshire, 403 U.S. 443 (1971), is one of the most abused and misused tools in law enforcement's arsenal.

How long can responsible members of the bar continue to let this go on. It is not the successes of the abuse which cause the community a problem, it is the failures. Imagine how many of these sham traffic stops and searches have to be conducted before contraband is found.

Would we put up with it in our own communities? Certainly not! Then why are we so quick to put up with it in the poorer less fortunate ones?

The police will never do better if we do

not start using our eyes, and our minds, and calling a spade a spade. Every time we look the other way, the officers who are aware of the case become more emboldened and the policy becomes more engrained and sanctioned by the courts. The police would not do these things if they thought for one minute we cared enough to hold their testimony to the same scrutiny we hold other witnesses.

In the case at bar, the officers story is unworthy of belief. It was proved a lie through photographs and testimony. A young lawyer, not a party and not representing a party testified that on examination of the automobile in question the contraband could not have been where the officer testified it was. The police officer was caught in a story which he could not get out of. What was the trial court's solution? A gentle suggestion to the officer as to his proper course.

THE COURT: So you could be wrong?

A: I could be wrong--

THE COURT: As to exactly where it was?

A: -- as to exactly where it was, because it just happened so fast.

This suggestion by the court occured during the third suppression hearing in this case. Either this concession, orchestrated by the court, had to be accepted by the officer, or the evidence had to be suppressed.

The court went on to find that all the defendant's witnesses were unworthy of belief. They all testified that the officer reached under the drivers seat and pulled a shoe box out, lifted the cover from the box and found the contraband. The one exception the court made regarding a witness of the defendant was the young lawyer, Marco Gonzales. The court found his testimony to be the truth. The court also found the police officers testimony to be true. That defies common sense. Gonzales testimony, if true, cannot support a finding of the officers testimony as truth.

A careful perusal of the record will reveal many instances wherein the officer was caught and had to hedge on his story. Gonzales never hedged. He took photographs to

prove his point and they were introduced as evidence and are a part of the record.

Sham traffic stops are illegal and this Court has so stated in a number of cases. United States v. Smith, 799 F.2d 704, (11th Cir. 1986), United States v. Miller, 821 F.2d 546, (11th Cir. 1987), United States v. Bates, 840 F.2d 858, (11th Cir. 1988), United States v. Hardy,
855 F.2d 753 (11th Cir. 1988). The inquiry prescribed by this line of cases concerning pretextual seizure is "Whether a reasonable officer would have made the seizure in the absence of illegitimate motivation. In the case at bar, it is highly unlikely that the officers would have even stopped the automobile driven by defendant for only failing to give a turn signal.

Does the fourth amendment to the United States Constutution mean so little that the police can get around it with such a flimsy story? Has the burden of proof in narcotics cases shrunk to the point of being any cock

and bull story which the police tell which, when taken in its best light furnishes probable cause? Are we no longer charged with using our common sense to determine truth? In these type cases is it the defendant who must prove his innocence? That would appear to be the case.

A "Terry stop" cannot be used as the basis of a "full search" that would normally be warranted only by the existence of probable cause, consent or a valid arrest. Terry v. Ohio, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). So, going under the passanger seat, pulling out the shoe box and opening it, are clearly illegal and shold not be condoned. U.S. v. Place, 462 U.S. at 706, 103 S.Ct. 2644.

SENTENCING

Defendant was sentenced December 15, 1989, and as part of the sentence imposed, the trial Court, on its own motion, gave the Defendant an additional two points for obstruction of justice (R5-9) and refused to

give the defendant credit of two points for acceptance of responsibility. (R5-20).

On the trial court's own motion, it decided to hold the defendant liable for obstruction of justice. This is true even though the arresting officers, the government, and the United States Probation Office were all silent as to any obstruction on the part of this defendant. The Court stated it was basing its addition of two points for obstruction on a statement police said the defendant made to them while in the police car headed for jail. He is alleged to have said, " Can you not keep that and let me go?" (R3-15). According to the Guidelines Section 3C1.1 Commentary 2, this provision should be applied by evaluating the suspect testimony and statements in a light most favorable to the defendant. It is entirely possible the defendant was only engaged in wishful thinking rather than an outright, willful attempt to bribe the police into letting him go.

Even though the government (R5-15)

recommended to the Court that the defendant be granted two points for acceptance of responsiblity as manifested in the record (R4-138), the trial judge chose to deny the defendant the points. The Court cited as part of his reasons that the defendant agreed to plead guilty only after the case had been called for trial and at the point of calling a jury. (R5-17). The trial court neglected to take into consideration Title 28 U.S.C. section 944(a) Federal Sentencing Commission Guidelines Section 3E1.1(b), which reads:

> "A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guild by the Court or jury or the practical certainty of conviction at trial."

If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction... Section 3E1.1(a)

In the case at bar, the defendant plead guilty immediately after an adverse ruling on his

third suppression hearing. This was immediately before a jury was called. The suppression hearing was an exercise of the defendant's right to be free from unreasonable searches and seizures and yet it would appear from the trial court's comments that his exercise of that right precludes him from credit for acceptance of responsibility.

> Section 2E1.1, Commentary 2 says: "Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest a sincere contrition even if he exercises his constitutional right to trial. This may occur, where the defendant goes to trial to preserve issues that do not relate to factual guilt (e.g. to make a constitutional challenge to a statute or a challange to the applicability of a statute to his conduct.)"

In the transcript of the September 9, 1989 hearing before the trial court (R4-138) the defendant was asked directly by the trial court if the cocaine was in the car the defendant was driving. The defendant answered "yes". The court then asked if the defendant knew the cocaine was in the car. The defendant again answered "yes".

It is difficult to imagine a clearer acceptance of responsibility for a crime than to stand in a courtroom before a federal judge in the presense of the U.S.Attorney and a court reporter and admit the two elements of the indictment. Any requirement of a manifestation of acceptance of responsibility beyond what this defendant did is contrary to law and common sense.

In addition to everything else, if judges are going to treat defendant's who plead guilty in this rough handed and cavalier fashion, why should any criminal defendant even consider a plea. This particular defendant could not have received any worse treatment if he had gone to trial and been convicted.

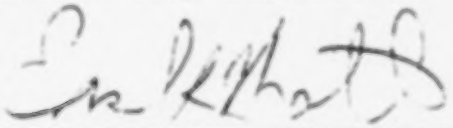
by: _____
Attorney for appellant

CONCLUSION

Based on the foregoing facts and case law

the Petition for a Writ of Certiorari should be granted.

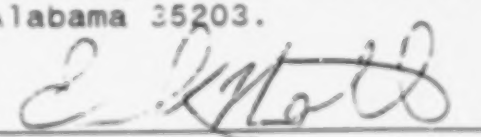
Respectfully submitted,



Erskine R. Mathis
Attorney for Petitioner
1117 22nd Street South
Birmingham, Alabama 35205
(205)933-1300

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on opposing counsel by U.S. Mail, this the 26th day of December 1990, by mailing a copy to John C. Ernest, Jr., Assistant U.S.Attorney, 1800 North 5th Avenue, Birmingham, Alabama 35203.



Erskine R. Mathis

Supreme Court, U.S.
FILED
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NO.

90-1346

IN THE SUPREME COURT OF THE UNITED STATES

GENNIE DARYL KING,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

Erskine R. Mathis
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No.

IN THE SUPREME COURT OF THE UNITED STATES

GENNIE DARYL KING,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA

JUDGMENT INCLUDING

V. SENTENCE UNDER THE

SENTENCING REFORM

GENNIE DARYL KING ACT

Case No. CR89-C-135-S

Byron Bart Slawson

Defendant's attorney

THE DEFENDANT:

Pleaded guilty to count one

Accordingly the defendant is adjudged guilty of such count, which involves the following offenses:

21 USC 841(a)(1) possess with intent to distribute a controlled substance (cocaine)

It is ordered that the defendant shall pay to the United States a special

assessment of $50.00 which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. Number:

422-80-1883

Date of imposition of sentence:

December 15, 1989

Defendant's mailing address:

609 3rd Place

Pratt City, Al 35214

s/ U.W.Clemon

U.W.Clemon,

U.S.District Judge

Defendant's residence:

December 19, 1989

same as above

date

Defendant: GENNIE DARYL KING

Case Number: CR-89-C-135-S

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of

ONE HUNDRED AND TWENTY (120) MONTHS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

FIVE (5) YEARS

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. defendant not possess a firearm or any other dangerous weapon;

2. defendant participate in a program approved by the U.S.Probation Office for urinalysis testing and, if necessary, treatment of narcotics addiction and/or drug dependency.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7001
Non-Argument Calendar

D. C. Docket No. CR89-C-135-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GENNIE DARYL KING

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Alabama

(August 14, 1990)

Before FAY, HATCHETT and COX, Circuit Judges.

PER CURUAM:

Affirmed, See Circuit Rule 36-1.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GENNIE DARYL KING

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING

Before FAY, HATCHETT and COX, Circuit Judges.

PER CURUAM:
The petition(s) for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

s/ Joseph Hatchett
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,)

PLAINTIFF,)

VS.)CR 89-C-0135-S

GENNIE DARRYL KING,)

DEFENDANT.)

MOTION TO SUPPRESS

Comes the defendant, by undersigned counsel, and moves to suppress the evidence seized at the time of his arrest and as grounds asserts as follows:

1. Defendant was arrested pursuant to a sham traffic stop, wherein he had not committed violation, but was stopped purely and simply to give the police an opportunity to search his automobile.

2. Under the circumstances of the traffic stop in question the police had no right whatsoever to stop the defendant and certainly no right to search his automobile.

3. Said search and seizure was unconstitutional.

4. The arrest of the defendant in this particular situation was itself unconstitutional and illegal.

RESPECTFULLY SUBMITTED,

ERSKINE R. MATHIS
ATTORNEYS FOR DEFENDANT
933 FRANK NELSON
BIRMINGHAM, ALABAMA 35203
(205) 323-6170

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on John Ernest by placing same in the U.S. mail, first class, postage pre-paid on this the _____ day of July, 1989.

OF COUNSEL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA)

)

PLAINTIFF,)

)

VS.)CR 89-C- -135-S

)

GENNIE DARRYL KING,)

)

DEFENDANT.)

MAGISTRATE'S REPORT AND RECOMMENDATION

This cause came to be heard before the undersigned Magistrate upon the motion of the defendant in this criminal action to suppress approximately 503 grams of cocaine seized by Birmingham police officers from a vehicle driven by Gennie Daryl King on June 10, 1989. After consideration of the testimony of the witnesses, as well as

exhibits entered into evidence, as well as the examination by the Magistrate of a shoe box which was purported to contain the controlled substance made the basis of the indictment, it is the RECOMMENDATION of the United States Magistrate that the motion to suppress be DENIED.

FACTS

On June 10, 1989, Birmingham police officers, David Clements and C.W. Owen, were stopped at a stop sign on 14th Street and Avenue F at approximately 2:00 p.m. A maroon and black Suzuki Samuri traveling on 14th Street turned right onto Avenue F without using a turn signal indicator as required by Birmingham City Code 10-8-35. Officer Clements, who was driving the police car, asked his partner whether he had observed the improper

turn. When Office Owen confirmed that he had seen the violation Officer Clements turned on the blue lights of the patrol car and followed the Suzuki. The vehicle did not stop immediately, requiring the brief use of the siren to gain the attention of the driver.

The Suzuki pulled to the roadside at Avenue H and 14th Street. According to the procedure of these officers, Officer Clements remained seated in the police car while Officer Owen approached the Suzuki from the right rear, as a "cover man". The passenger and drivers windows of the Suzuki were down. However, the rear and side glass were darkly tinted making it impossible to see the interior of the vehicle from the rear. Officer Clement saw the driver of the Suzuki looking back at him through the outside rear view mirror. This observation by the driver took place

while Officer Clements radioed the dispatcher that the officers had made a traffic stop. Officer Clements radioed the Suzuki tag number at the same time. The driver suddenly hurriedly exited the Suzuki and proceeded quickly[1] to the patrol car. Officer Clements met the driver, identified as the defendant, Gennie Daryl King. Officer Clement told the defendant of the infraction, patted him for weapons and placed him in the rear of the police car to write a citation[2]. Officer Clements radioed the

---

[1] Officer Clements testified that the driver did not quite run to the police car, but walked very quickly.

[2] Officer Clements testified that the pat down is routine when suspects of any kind are placed in the patrol car. While defendant's counsel argues that it is not routine for officers to place violators in the back seat of the patrol

information from the defendant's drivers license to his dispatcher.

After the stop, Officer Owen had approached the Suzuki from the right rear, or passenger side, of the vehicle. The officer was looking into the Suzuki through the open passenger window while the defendant was hurriedly exiting from the drivers side door. Officer Owen saw the right foot or leg of the defendant strike or kick a small shoe box resting on the passenger side floor board dislodging the top revealing a plastic

---

car, (1) there is no evidence that this procedure of Clement's is wrong and (2) Clement's did not ask the defendant to come to the patrol car; the defendant came back to the police car. There is nothing unreasonable about the pat down under these circumstances.

bag with a white substance inside. Officer Owen, a 14-year police veteran, considered the substance to be cocaine in the form commonly referred to as crack. A female passenger, identified a Marvaline Whatley immediately stated that she did not know that was in there and "that she didn't know anything about in." The passenger then got out of the Suzuki through the passenger side door. Officer Owen picked up the box, which was a child's shoe box approximately 9 3/4" x 5 1/2" x 3 1/4", containing the plastic bag with the white powder. The substance was in both a powder state and contained some material described as chunks. Officer Owen, using a hand-held radio, called for a supervisor before returning to the area behind the Suzuki and in front of the patrol car with Officer Clements. He then showed the shoe box and its contents to Officer Clements. The defendant was placed under arrest.

ISSUES

In urging his motion to suppress the cocaine evidence seized from the vehicle he was driving, the defendant contends that the traffic stop initiated by the uniformed police officers on June 10, 1989, was a sham intended merely to provide an opportunity to search the automobile driven by the defendant and a second issue as developed from the testimony, that the seizure of the cocaine on June 10, 1989, was the result of an illegal search of the vehicle rather than, as asserted by the government, a proper action under the "plain view" doctrine.

DISCUSSION

In assessing a claim that a particular traffic stop was a sham

motivated by an improper purpose, the seminal authority is found in United States v. Cruz, 581 F.2d 535 (5th Cir.1978) and it's progeny. From Cruz, the Eleventh Circuit Court of Appeals has evolved a test to be applied to determine whether particular police conduct is a sham. The question is whether a reasonable officer would have made the seizure in the absence of an illegitimate motive. United States v. Smith, 799 F.2d 704 (11th Cir.1986); United States v. Miller, 821 F.2d 546(11th Cir.1987). The test has actually two principle components: (1) was the traffic stop itself objectively reasonable, that is, would an officer make such a stop absent an improper motive and (2) only then, was there an improper motive? The improper motive aspect of the test is not controlling but is relevant under the inquiry. A motion to suppress is not properly granted where an officer creates

the opportunity for a suspect to violate traffic laws merely because he has a "hunch" that the vehicle is carrying contraband. United States v. Bates, 840 F.2d 858 (11th Cir.1988). So long as the traffic stop itself is one which might have been made by a reasonable officer under similar circumstances. United States v. Hardy, 855 F.2d 753 (11th Cir.1988)[3]. In Smith and Miller, the same state trooper testified alleging that a suspect vehicle weaved slightly inside a single traffic lane and traveled six inches onto the printed white line of the highway shoulder. He further testified in Miller that he would have stopped the suspect vehicle regardless of the alleged traffic violation based upon

---

[3] J. Hill's concurring opinion in Hardy notes that the Fifth Circuit has completely abandoned the "motive" test of Cruz

a drug courier profile[4]. In each case, the Eleventh Circuit held that a reasonable officer would not have made the traffic stop absent some other motive.

Although the defendant has offered no authority for his legal position, it would appear that he is attempting to find application of Smith and Miller while avoiding the tenets of Hardy and Bates. In support of his motion, the defendant apparently claims that Officers Clements and Owen stopped the vehicle driven by Gennie Daryl King in hopes that it was driven by its putative owner identified as Brodrick Thomas. Officer Owen testified that three or four months

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[4] In fact, the trooper was accompanied by an agent with the Drug Enforcement Administration during his patrol. His mission was principally drug intervention.

before stopping the defendant on June 10, 1989, he had given Brodrick thomas a citation for driving with an expired license. Owen also testified that he had seen Thomas in a black Suzuki on the street near the home of Thomas's mother on another occasion. Officer Owen testified that Thomas's Suzuki was solid black. He also noted that the vehicle driven by the defendant had maroon canvas top and sides. He did not realize the vehicle driven by the defendant belonged to Thomas until after the defendant had been arrested. Both Officer Clements and Owen testified that they did not see a personalized license plate which defendant's counsel indicated said "Brod" on the front of the Suzuki.

Officer Clements testified that he had been a police officer since March 11, 1989. Clements did not know Brodrick Thomas or the defendant prior to the

stop. He also testified that he and Owen did not discuss Brodrick Thomas in any fashion prior to stopping the vehicle.

Applying the test of Cruz, there is no question that all evidence supports the conclusion that the traffic stop of June 10, 1989, was objectively reasonable. Because a reasonable officer under similar circumstances would have taken the same action, there is no need to assess whether the officers had some motive other than traffic enforcement in mind. However, even if such a motive were relevant, there is no evidence in support of such a finding. (1)Officer Clements, who first initiated the process by which the decision to stop the defendant was made, had been a police officer only since March 11, 1989. (2)He had never arrested Brodrick Thomas. (3)Officer Clements had written three citation for failing to use a turn signal

prior to the June 10 stop of the defendant's vehicle. (4) Officer Owen had issued a traffic citation to Brodrick Thomas three or four months before the stop of the defendant and talked with Thomas in a Suzuki one other occasion. (5) Owen thought the vehicle owned by Brodrick Thomas was solid black and did not recognize the car driven by the defendant as belonging to Thomas. (6) Owen did not learn the Suzuki driven by the defendant was Thomas's car until after the defendant had been arrested. (7) There is no evidence to indicate to any degree or in any fashion that the two uniformed patrol officers expected to find contraband when the stopped Gennie Daryl King on June 10, 1989.

Accordingly, the Magistrate finds that the traffic stop was reasonable and not a sham or subterfuge.

SEIZURE OF THE COCAINE

Defense counsel conceded in his argument to the Magistrate that the cocaine removed from the vehicle driven by the defendant was properly seized if it was in the "plain view" of Officer Owen inside the car when he looked in through the passenger window. Coolidge v. New Hampshire, 403 U.S. 443 (1971). The defendant offered thirteen photographs of the Suzuki showing both the interior and exterior of the vehicle. Prior to viewing any photographs, Officer Owen testified that the shoe box containing the cocaine was between the dashboard and the gear shift when he saw it kicked by the defendant as the exited the Suzuki. the accidental kick dislodged the box

causing it to fall to the floorboard on the passenger side spilling open. The photographs of the vehicle show two gear

shift levers, one apparently for the four-wheel drive and the other for the transmission. The officer marked a space between the transmission gear shift lever, forward of the smaller selector lever, and the fire wall as the area in which he saw the box as it was kicked.

The defendant contends that (1) the box would not fit in the space where Officer Owen said he saw it and (2) because it would not he must be "fabricating" the entire story. Each assertion is without merit. The box was examined by the Magistrate. It is approximately 9 3/4" x 5 1/2" x 3 1/4" in size. Defendant's exhibits 3 and 13 demonstrate upon viewing the box that there is adequate space for the box in the area marked by Officer Owen. Defendant's exhibits 10, 11, and 12 demonstrate that the interior near the transmission hump is clearly visible from

the passenger windows. This is true even though the photographs limit the range to a single point of view. The plain view doctrine applies to articles which can be seen through the door or window of an automobile. United States v. McDanies, 550 F.2d 214(5th Cir. 1977). After examining the box and the photographs, it became apparent to the Magistrate that a view of the vehicle was unnecessary.

However, the defendant is simply wrong when he avers that the officer must have fabricated the discovery if the box did not fit in the space described. The vehicle has two gearshift levers, and it is not unreasonable that in the short time in which he had to observe the event the officer might have been mistaken as to the placement of the box. Even so, it is undisputed that before he seized the box and its contents it was upon the floor board. It is also undisputed that

the female passenger had immediately disavowed ownership of or even knowing of its contents before it was seized. Contrary to the argument of counsel there is no evidence that the box was no on the floor, open prior to its seizure. While the Magistrate is persuaded from the evidence that the box was indeed where Officer Owen said it was prior to its being kicked, there is no question it was on the floor open when seized. Accordingly, the seizure was proper under the "plain view" doctrine. Texas v. Brown, 460 U.S. 730 (1983).

RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

In accord with all the above, it is RECOMMENDED that the motion to suppress be DENIED.

Any party who objects to this report and recommendation must, within ten (10) days of the date on which it is entered, file specific written objections

with the Clerk of this Court. Failure to do so will bar any later challenge or review of the factual findings of the magistrate. See 28 U.S.C. 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed. 2d 435 (1985) reh'g denied, 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.ed 933 (1986); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en banc). In order to challenge the findings of the magistrate, a party must file with the Clerk of the Court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a de novo determination of those portions of the report, proposed

findings, or recommendation to which objection is make and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a District Judge.

A party may not appeal a magistrate's recommendation directly to the United States Court of Appeals for the Eleventh Circuit.

Appeals may be made only from a final judgment entered by or at the direction

of a District Judge.

The Clerk is DIRECTED to serve a copy of this report and recommendation on the United States Attorney for the Northern District of Alabama and counsel for defendant.

DONE this 9th day of August, 1989.

s/Paul Greene

PAUL W. GREENE

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,)

)

PLAINTIFF,)

VS.) MAG.89-101

GENNIE DARRYL KING,)

)

DEFENDANT.)

MOTION TO REOPEN SUPPRESSION HEARING

Comes now the defendant and moves the Court to reopen the suppression hearing which was held on August 7, 1989 on the following grounds:

1. The magistrate has not yet entered his Order on said issue.

2. Defendant has located a material witness to the search whose testimony will refute that of the arresting officer.

3. The searching officer testified unequivocally to a fact material and

crucial to the legality of the warrantless search which cannot be refuted without further examination of the vehicle searched.

4. Said examination and the testimony and exhibits arising from same are crucial to the defense.

5. Defendant could not have foreseen the testimony which gave rise to the necessity for said examination.

6. Defendant moved the Court to view said automobile and conduct its own examination prior to the close of said suppression hearing but the Motion was denied.

7. Defendant has, herewith, filed a Motion to Inspect, Examine and Photograph for the purpose of securing the evidence necessary.

8. Due process, the rights of the defendant under the Fourth Amendment to the United States Constitution, his right to confront and cross-examine witnesses

and the evidence against him and his fundamental right to a fair hearing will all be violated if defendant is deprived of the opportunity to reopen said hearing and produce said evidence.

RESPECTFULLY SUBMITTED,

_____

ERSKINE R. MATHIS
ATTORNEY FOR DEFENDANT
933 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4908

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on John Ernest and Bob McGregor by placing same in the U.S. mail, first class, postage pre-paid on this the _____ day of August, 1989.

_____

OF COUNSEL

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
PLAINTIFF,	
VS.	CR 89-C- -135-S
GENNIE DARRYL KING,	
DEFENDANT.	

MAGISTRATE'S SUPPLEMENTAL REPORT AND RECOMMENDATION

Gennie Daryl King, the defendant in the above-referenced criminal action, filed with this Court a motion in which he sought the suppression of some 503 grams of cocaine seized from a vehicle he was driving on June 10, 1989, following what was purported to be a

routine traffic stop. The defendant's motion was referred to the undersigned magistrate pursuant to 28 U.S.C. 626B(b)(1) and Local Rule (2)(a)(1)(B). See also United States v. Raddatz, 447 U.S. 667 (1980). On August 7, 1989, an evidentiary hearing was held. On August 9, 1989, a report to the district court was filed by the magistrate recommending that the defendant's motion to suppress be denied. Subsequent to the evidentiary hearing, but apparently prior to the entry of the magistrate's report and recommendation, the defendant filed two additional motions. The first motion was to permit additional inspection and photographing of the vehicle driven by the defendant on June 10, 1989. The second motion, claiming that a material witness had been located, requested the magistrate reopen the evidentiary hearing. Both motions were granted, and a second evidentiary hearing was held on

August 16, 1989. At the second hearing, the defendant offered the testimony of Mr. Marco Gonzalez, an attorney, Ms. Marvalyn Whatley[1], and Mr. Kirk Crawford. At the supplemental hearing, the Government offered testimony from Officer Joseph Russell, Sergeant William Harris, Officer Suzanne Orange of the Birmingham Police Department and at the direction of the Court, recalled Officer Carlos Owen, an officer who testified at the August 7 hearing.

After careful consideration of the evidence adduced at the second hearing and a reassessment of the evidence from

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[1] Ms. Whatley, the passenger in the vehicle driven by the defendant, was identified in the August 9 report and recommendation as Maryline Whatley.

the first evidentiary hearing, it is the RECOMMENDATION of the magistrate that the defendant's motion to suppress by DENIED.

SYNOPSIS OF THE AUGUST 7, 1989 HEARING

As more fully set out in the August 9, 1989 report and recommendation, the salient facts in this action are that on June 10, 1989, Birmingham Police Officers Clements and Owen stopped a vehicle driven by the defendant for failing to use a turn signal while executing a turn in violation of a Birmingham city traffic ordinance. When Officer Owen approached the vehicle, a Suzuki Samurai, from the passenger side, he observed, through the open passenger window, the defendant kick or knock a small shoe box from the transmission hump near the gearshift lever to the floor board on the passenger side spilling its contents, a plastic bag containing

approximately one pound of cocaine. The passenger, Marvalyn Whatley, immediately stated something to the effect that she had nothing to do with "that" and that she didn't know "that" was in the vehicle. Officer Owen, a 14-year police veteran, recognized the substance as cocaine, assuming it to be a cocaine product known as crack.

At the first hearing, the defendant contended that the initial stop of his vehicle was a sham intended only to provide an opportunity to search the car. The defendant introduced thirteen photographs, ten of which were of the vehicle's interior concentration on the transmission hump and the area around two gearshift levers in the vehicle. Officer Owen was extensively cross-examined as to the position of the shoe box containing the cocaine immediately prior to its fall the passenger floor board. Officer Owen

testified the box was between the forward gearshift lever and the fire wall, under a stereo equalizer when it was kicked by the defendant.

The August 9, 1989 report and recommendation rejected the defendant's contention that the traffic stop was a sham on the authority of United States v. Bates, 840 F.2d 858 (11th Cir. 1988) and United States v. Hardy, 855 F.2d 753 (11th Cir. 1988) finding inapplicable United States v. Smith, 799 F.2d 704 (11th Cir. 1986), and United States v. Miller, 821 F.2d 546 (11th Cir. 1987), at least in part because no evidence existed that either officer expected to find controlled substances in the vehicle prior to the decision to issue the traffic citation.

AUGUST 16, 1989 TESTIMONY OF DEFENDANT'S WITNESSES

MARCO GONZALEZ

Mr. Gonzalez, an attorney in the employ of the defendant, together with a photographer and Birmingham Police Officer Joseph Russell, inspected the Suzuki Samurai at the police impound lot on Tuesday, August 15, 1989. A number of measurements of the transmission hump and various devices attached on or around that area were made by Mr. Gonzalez. In addition, Mr. Gonzalez attempted to place an identically sized shoe box in various positions in and around the transmission hump. These efforts were photographed. Mr. Gonzalez concluded that the shoe box could not have rested between the forward gearshift lever and the fire wall in such a position that it could be kicked by the defendant while exiting through the passenger side as stated by Officer Owen.

Marvalyn Whatley

Ms. Whatley, the passenger in the vehicle driven by the defendant on June 10, 1989, testified that Officer Owen asked her if she was the girlfriend of Broadrick Thomas, the owner of the Suzuki Samurai. She also testified that Owen searched her purse, then had her get out of the car. According to Ms. Whatley, Owen searched the glove compartment, behind the seats, and finally under the passenger seat where he found the box with the one pound of cocaine. Ms. Whatley stated that it was at the time that she told Officer Owen that she did not have anything to do with the drugs.

Kirk Crawford

Mr. Crawford testified that he was walking in the Ensley area on June 10, 1989. He had gone to Rene's house

(Marvalyn Rene Whatley) looking for Gennie Daryl King. He said that he saw the Samurai with the police car following it coming down the street. Mr. Crawford testified that, as a friend of the defendant's, he stood across the street from the vehicle watching what occurred. He stated that he saw the defendant get out of the Samurai and go to the patrol car. He testified that he observed Officer Owen approach the car from the passenger side. He stated that Ms. Whatley got out of the car after talking with Officer Owen. Mr. Crawford testified that through the open driver's door he observed Officer Owen search the glove compartment, behind the seats, and under the passenger seat locating the shoe box.

ASSESSMENT OF THE TESTIMONY OF THE DEFENDANT'S WITNESSES AND REASSESSMENT OF THE REPORT AND RECOMMENDATION OF

At the August 16, 1989 hearing, the Government introduced photographs, Government's Exhibits 1 and 2, showing the actual shoe box seized from the defendant on June 10, 1989, located between the gearshift lever and the fire wall under a stereo equalizer. Mr. Marco Gonzalez testified that the box would not stay in that position without being held when he conducted a similar experiment. From an observation of the box and the space in question, the magistrate concluded in the report and recommendation of August 9 that "there is adequate space for the box [in that area]." That finding was merely an assessment of the lateral size of the opening in light of the size of the end of the box. While the Government's Exhibits 1 and 2 of the August 16 hearing demonstrate that the conclusion is

technically correct, the finding implicitly made in the report and recommendation was clearly wrong. Mr. Gonzalez, and apparently earlier Officer Russell, conducted experiments with the box in this position while the box was empty. While an empty box may fit between the forward gearshift lever and the fire wall on the passenger side, (1) it is unlikely that the box in Government's Exhibits 1 and 2 would remain in place with a pound of cocaine inside. (2) Mr. Gonzalez testified that he could not get the empty box to stay in the position forward of the gearshift lever without holding the box in place. (3) Even if the box would remain in place with its contents as it existed on June 10, 1989, Officer Russell testified that it would be virtually impossible for the box to be kicked by the defendant exiting the Samurai from the driver's side.

The principle reason the magistrate found that a view of the Suzuki Samurai was unnecessary was, given the limited time in which Officer Owen had to observe the defendant's action and the fall of the box, it was immaterial whether he had been mistaken as to its precise location immediately prior to the box becoming dislodged. As noted in the August 9 report and recommendation, it is not necessary to conclude that had "fabricated" his testimony nor conducted a "sham" traffic stop even if a finding were made that Officer Owen was mistaken as to the precise location of the box prior to observing it fall to the floor board. Indeed, that was the specific finding of the August 9 report and recommendation.[2] Accordingly, the

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[2] Indeed, it is fairly easy to construct a number of reasonable hypotheses with respect to the

testimony of Mr. Gonzalez does not affect the conclusion that Officer Owen saw the bag of cocaine on the floor once the box was open after the fall.

MARVALYN WHATLEY AND KIRK CRAWFORD

Initially, it should be noted that the defendant contended that the August 7 hearing should be reopened because he

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defendant's actions. For example, Officer Owen may have mistaken the defendant's attempt to place the box inside the purse of Ms. Whatley, which was, according to her testimony, resting on the passenger side floor board, while simultaneously trying to exit the vehicle. The important fact is that Officer Owen had only a brief opportunity to view the box prior to its fall to the floor but was able to see clearly the box and its contents once they were on the passenger side floor board.

had just "located" a material witness to the arrest on June 10. Neither Ms. Whatley, the passenger in the defendant's vehicle, nor Mr. Crawford testified on August 7. However, it was clear from the testimony that Ms. Whatley had lived with the defendant prior to the arrest for some substantial period of time and may have still lived with him on June 10. Ms. Whatley has a five-month-old child, Jasmine, whose father is the defendant, Gennie Daryl King. Ms. Whatley and the child have visited the defendant in the Jefferson County Jail since his arrest on this charge.

Mr. Kirk Crawford, a friend of the defendant, testified that he saw the events on June 10, but did not discuss them with anyone until he talked with the defendant's attorney after the August 7 hearing. Mr. Crawford testified that he talked with the defendant by telephone on

more than one occasion since the defendant's arrest, the latest only two days before the August 16 hearing. Clearly, the August 7 suppression hearing had as its fundamental theme the transmission hump location of the shoe box. Yet, Mr. Crawford did not discuss with extraordinarily thorough and experienced defense counsel what he had seen on June 10 until after the August 7 hearing at which the defendant was, of course, present.

Marvalyn Whatley

As noted, Ms. Whatley was a passenger in the defendant's vehicle on June 10. Her testimony is, with minor exception, in direct conflict with that of Officers Clements and Owen. Initially, Ms. Whatley claimed that the defendant did indeed signal before the turn for which he was stopped,

contradicting the testimony of Officer Clements at the August 7 hearing. More substantially, she testified that she was outside the vehicle while it was searched by Officer Owen when he purportedly found the box under the passenger seat.

Ms. Whatley, who is not now employed, has been employed recently only by the sister of the defendant. She has a baby by the defendant born only five months ago. Yet, incredibly she testified that after the defendant was placed in jail she and Gennie Daryl King had never discussed the facts of his arrest or what she saw on June 10. She stated that she only took the child to see the defendant in the jail and did not discuss the arrest. In assessing Ms. Whatley's testimony, it is obvious that she has an emotional and apparently a financial bias toward the defendant. Evidence showing emotional partiality of

a witness is always significant in assessing credibility. United States v. Robinson, 530 F.2d 1076 (D.C.Cir. 1976). Partiality, or any act, relationship, or motive reasonably likely to produce it, may tend to impeach credibility. United States v. Cravero, 545 F.2d 406 (5th Cir. 1976). The relationship of girlfriend, and as the mother of the defendant's child, clearly suggests that the witness's credibility is subject to examination. Saladino v. Winkler, 609 F.2d 1211 (7th Cir. 1979).

Despite the witness's testimony that she had not discussed the drugs found in the defendant's vehicle with any police officers, the testimony of Officers Harris and Orange, who spoke with the witness on June 10, clearly reveals that both officers discussed the drugs with her. Ms. Whatley did not complain of the alleged search to either

officer nor in a later call to Officer Russell when she sought the return of several hundred dollars taken from her purse on the day of the arrest. Ms. Whatley told Officer Russell during that call that the defendant had given her two one-hundred-dollar bills found in her possession.

After careful consideration of the witness's testimony, her interest in the outcome of the case, her relationship to the defendant, the fact that she was apparently available to testify on August 7, and following observation of her demeanor during the hearing, the magistrate finds this witness's testimony on material facts to be incredible and unworthy of belief.

Kirk Crawford

Mr. Crawford testified that he had

known the defendant for approximately two years. The defendant and the witness rented the same apartment. Mr. Crawford testified on cross examination that he and the defendant had "lived together". On re-direct examination, the witness claimed that he had only meant that the defendant had stayed at his apartment a few nights. Mr. Crawford testified that he had never discussed the events he claims to have observed on June 10 until he talked with the defendant's counsel after the August 7 hearing. Mr. Crawford testified that he had gone on to Marvalyn Whatley's home on June 10 when he saw the Samurai stopped by the police. Despite the fact that his friend and his friend's girlfriend were being arrested, he did not approach either on that day to see if he could be of assistance. He apparently did not, despite the defendant's detention by order of this Court, attempt to contact the defendant's lawyer about

what he had seen until after the August 7, 1989 hearing, despite the fact that the alleged search was the precise issue for which counsel had obviously prepared at the first evidentiary hearing on this motion.

After consideration of the witness's relationship to the defendant, his delay in approaching the defendant's counsel with his story, and after observing his demeanor on the witness stand, the magistrate finds his testimony inherently and absolutely without any credibility and unworthy of belief.

OFFICER CARLOS OWEN

The conclusion that the testimony of Ms. Whatley and Mr. Crawford is unbelievable is not dispositive of the defendant's motion. Officer Owen testified with apparent certainty on

August 7 that the shoe box was on the transmission hump when the defendant's leg of foot knocked it to the passenger side of the floor board. Officer Owen was wrong. In determining whether to believe the testimony of Officer Owen, the magistrate is unaffected by the defendant's later admissions made with respect to the cocaine, including apparent offers to the arresting officers for them to keep the cocaine and let him go. The issue in this matter is not now, nor has it ever been, the defendant's possession of one pound of cocaine. The issue is whether Officer Carlos Owen testified truthfully when he said that the shoe box was knocked by the defendant to the floor board spilling the bag with what he thought to be cocaine. If he told the truth, the contraband was clearly subject to seizure under the "plain view" doctrine. If he conducted a search, however limited, he has

violated the Fourth Amendment rights of this citizen, a matter of far more importance than 500 or 5,000 or even 5,000,000 grams of cocaine.

After consideration of the testimony of Officer Owen at both the August 7 and August 16 hearings, and in the absence of any credible testimony to the contrary to any material fact, the magistrate concludes that the testimony of Officer Owen is credible[3]

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[3] This finding is made fully cognizant of the fact that Officer Owen also had the opportunity to reflect on his August 7 testimony and state on August 16 that the box was "somewhere around the gearshift lever" when it was kicked. However, the magistrate had already concluded on August 9 that the location of the box prior to Officer

and therefore the magistrate RECOMMENDS that the defendant's motion to suppress be DENIED.

NOTICE OF RIGHT TO OBJECT

Any party who objects to this report and recommendation must, within ten (10) days of the date on which it is entered, file specific written objections with the Clerk of this Court. Failure to do so will bar any later challenge or review of the factual findings of the magistrate. See 28 U.S.C. 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed. 2d 435 (1985) reh'g denied, 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.ed 933 (1986); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982) (en 'banc). In order to challenge the findings of the magistrate, a party must file with the

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Owen's observation of it on the floor was not material given the limited time he had to view it before it came to rest a the feet of Ms. Whatley.

Clerk of the Court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a de novo determination of those portions of the report, proposed findings, or recommendation to which objection is make and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The judge may also receive further evidence, recall

witnesses or recommit the matter to the magistrate with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a District Judge.

A party may not appeal a magistrate's recommendation directly to the United States Court of Appeals for the Eleventh Circuit.
Appeals may be made only from a final judgment entered by or at the direction of a District Judge.

The Clerk is DIRECTED to serve a copy of this report and recommendation on the United States Attorney for the Northern District of Alabama and counsel for defendant.

DONE this 18th day of August, 1989.

s/Paul Greene

PAUL W. GREENE

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,)

)

PLAINTIFF,)

)

VS.)CR 89-C-135-S

)

GENNIE DARRYL KING,)

)

DEFENDANT.)

OBJECTIONS TO MAGISTRATES

REPORT AND RECOMMENDATION

Comes the defendant, by undersigned counsel, pursuant to 28 U.S.C. 636(b)(1)(c) and submits the following objections to the Magistrates Report and Recommendation and Supplemental Report and Recommendation.

1. Defendant objects to the Magistrate's original report and recommendation at page 7 wherein he found

"defendant's exhibits 3 and 13 demonstrate upon viewing the box that there is adequate space for the box in the area marked by Officer Owen." As grounds defendant asserts the following:

a. At the August 16, 1989 hearing defendant proved through testimony of Marco Gonzalez with aid of photographs that the shoe box would not fit in the space Officer Owen claimed it was. Defendant went further and proved the shoe box would not fit on the transmission hump anywhere in such way that it could be bumped or kicked into the passenger floorboard by a driver exiting the vehicle.

2. Defendant objects to the Magistrate's original report at pages 7 and 8 wherein he finds that the police officer could have made on honest testimonial mistake and still have conducted on a legal plain view seizure. As grounds defendant asserts:

a. At page 34 of the transcript of the August 9, 1989 hearing Officer Owen on direct examination, in answer to the assistant U.S. Attorney's question testified: "Well, yeah. It's a transmission hump that goes between the two front seats and had a gear shift. And there's a shoe box sitting right in front of the gear shift."

At page 35, line 15, the officer testified:

"And when he exited the vehicle, his leg hit the box and pushed it over to the right hand side and knocked the top off it.

b. That testimony does not appear to come from a witness who is equivocating in any way. That testimony is as close and positive as it could possibly be.

c. No legal plain view seizure could be made unless the top was off the box and the officer could see what he believed to be cocaine. The officer

testified the top was in place and that he saw it knocked off. Thus giving rise to the plain view seizure.

d. When defendant proved this could not have happened the Magistrate decided without any evidence to support his finding that the officer must have been mistaken, and therefore it must have been a legal plain view seizure anyway.

3. The defendant objects to the Magistrate's August 9, 1989 report and recommendation at page 8 when he finds "there is no question it was on the floor open when seized. Accordingly, the seizure was proper under the "plain view" doctrine.

a. If it could not have been where the officer said it was originally then why must it have been on the floor with the top off when he saw it?

b. The box was under the passenger seat as testified to in the April 14, 1989 hearing by Marvelyn Whatley.

4. Defendant objects to the Magistrate's synopsis of the testimony of Marco Gonzalez on page 3 and 4 of this report and recommendation of the August 14, 1989 hearing on the following grounds:

a. Mr. Gonzalez testified unequivocally the shoe box would not fit where Carlos Owen testified it had been.

b. Mr. Gonzalez testified the shoe box could not be knocked into the passenger floorboard if it were sitting between the gear shift lever due to a car telephone, which sat between the gear shift leer and the passenger side floorboard.

c. Mr. Gonzalez testified unequivocally the shoe box would not sit anywhere on the transmission hump so that it could have been knocked over into the passenger floorboard.

d. Mr. Gonzalez produced photographs

of a box the identical size of that seized in various positions in and around the transmission hump to prove he was testifying untruthfully.

e. Mr. Gonzalez testified that Officer Joey Russell told him the box would not fit and admitted the police department had already tried.

5. Defendant objects to the Magistrate's report and recommendation of the August 14, 1989 hearing at page 6 where he determined Officer Owen was mistaken and then goes to great pain at footnote 2 to speculate how it might have happened. As grounds defendant says:

a. He should not be judged by surmise, speculation, guesswork or hypothesis but by evidence, fairly admitted and fairly perceived.

b. The testimony at the first hearing was that Owen was watching at the passenger side door before the defendant exited the vehicle. He testified without

hesitation what he saw.

c. The conclusion that Owens was mistaken is not based on any credible evidence since defendant proved beyond a reasonable doubt through cross-examination of Owen, photographs, testimony of Mr. Gonzalez and additional photographs that what he was testifying to was impossible.

6. Defendant objects to the Magistrate's report and recommendation of the August 14, 1989 hearing at page 6 where he says:".....the testimony of Mr. Gonzalez does not affect the conclusion that Officer Owen saw the bag of cocaine on the floor once the box was open after the fall".

a. Defendant proved the box could not have been on the transmission hump. That being the case, there could be no fall.

b. Marvelyn Whatley and Kirk Crawford both testified that Officer Owen searched the vehicle and found the box under the

passenger seat.

c. This conclusion is absolutely contrary to the evidence.

7. Defendant objects to the Magistrate's report and recommendation of the August 14, 1989 hearing at pages 7 and 8 wherein he finds her testimony incredible and unworthy of belief on the following grounds.

a. She was never impeached on the witness stand.

b. She was present at the time of the incident.

c. She swore the same oath as Officer Owen whose testimony was proved completely fake and yet was found to be a credible witness.

8. Defendant objects to the Magistrate's report and recommendation at page 7 where he says Ms. Whatley discussed drugs with Officer Harris and Orange as grounds says as follows:

a. Harris' testimony when scrutinized

will indicate that he could very well be mistaken in what he heard. He said Ms. Whatley told him she knew the drugs were in the car prior to the arrest. Each of the other officers, including Owen, testified he did not know they were there. That is the extent of her discussion with any officer about the case and that occurred at the scene of the arrest. If that is impeachment, it is about as mild a form of it as I have seen.

9. Defendant objects to the Magistrate's report and recommendation at page 8 where he says she didn't complain about the search to Officer Joey Russell on the following grounds:

a. She is a member of a community where it is not in the least abnormal for police officers to stop automobiles for no other reason than to search them. Why should she believe this a violation of the law? No one has told her.

t. What rational reason would she have to complain to officer Russell, who she had been informed was in charge of the case?

c. What possible reasonable expectation could she have that if she did complain something would be done?

9. The defendant objects to the Magistrate's report and recommendation of the August 14, 1989 hearing at page 9 where he finds it noteworthy that Kirk Crawford did not approach the defendant or Ms. Whatley while the police were conducting their "search" and had this in custody to see if he could be of assistance. As grounds defendant avers:

a. All Kirk Crawford or anyone else would have got by doing such a foolish thing is a knot on the head.

b. This is not a proper consideration for the Magistrate to disregard a witness' testimony.

10. The defendant objects to the Magistrate's report and recommendation of the August 14, 1989 hearing at page 9 where he finds the testimony of Kirk Crawford absolutely without credibility and unworthy of belief on the following grounds:

a. There is no evidence from which such a finding could rationally come.

b. Compared to Officer Owen testimony Crawford is flawless.

11. The defendant objects to the Magistrate's report and recommendation of the August 14, 1989 hearing at page 9 and 10 where he finds that Owen's testimony gives with apparent certainty on August 7, 1989 was wrong and the finding that he still testified truthfully that the box was knocked to the floorboard dislodging the top and showing the cocaine. Defendant asserts the following grounds:

a. It was not remotely reasonable.

b. What he testified to as a positive

fact, when contradicted makes him wrong, but not untrustworthy. Not based on the evidence.

c. Owens' testimony was thoroughly impeached and contradicted by testimony of Gonzalez, Whatley & Crawford not to mention photographs.

12. The defendant objects to the Magistrate's report and recommendation of the August 14, 1989 hearing at page 10 where he says referring to Owens' testimony "..... in the absence of any credible testimony to the contrary to any neutral fact, the Magistrate concludes that the testimony of Carlos Owen is credible.....". As grounds defendant avers:

a. This finding is incredible based on the evidence presented.

b. The law means more than its results or lack thereof and the ends

should never justify the means.

c. This finding is completely baseless, without reason or logic.

CONCLUSION

All any criminal defendant can ever reasonably hope for in any court is a fair opportunity to meet the evidence against him and a fair consideration of that evidence is assessing the issue before the court. While fully benefitting from the former that the defendant has been woefully shortchanged on the latter.

For too many years we have looked the other way and cast logic and reason to the wind in upholding some of the most ridiculous stories supporting the plain view doctrine to the point that good police officers feel it is alright to fudge. This is an area of the law where it has always been done and the vast majority of the time upheld. We look but we do not see. We listen but we do not hear.

Carlos Owen is one of the finest and ablest police officers I have had the privilege of knowing. He gets the job done, even though it is difficult. He did it here. He got what the government alleges is 503 grams of cocaine off the street and for that he should be commended but the seizure is unlawful and if the law is supreme and justice blind as our law books tell us and if evidence means anything the cocaine must be suppressed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on John Ernest by placing same in the U.S. mail, first class, postage pre-paid on this the _____ day of August, 1989.

OF COUNSEL